Nos. 87-963, 87-1616

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT L. HERNANDEZ,
Respondent.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

KATHERINE JEAN GRAHAM, RICHARD M. HERMANN, AND DAVID FORBES MAYNARD,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Courts of Appeals for the First and Ninth Circuits

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BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Commissioner of Internal Revenue incorrectly applied § 170 of the Internal Revenue Code of 1954 in reversing seven decades of prior IRS interpretations and disallowing charitable contribution deductions for payments made by individual members of the Church of Scientology solely to participate in religious services of their faith.

2. Whether denying charitable contribution deductions under § 170 for payments by Scientologists to participate in their faith's core religious sacraments violates the religion clauses of the First Amendment.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

Hernandez v. Commissioner. The opinion of the Court of Appeals for the First Circuit is reported at 819 F.2d 1212 (1987). HPA 1a.[1] The opinion of the United States Tax Court in the case designated as providing binding factual and legal findings in *Hernandez* is *Graham v. Commissioner*, 83 T.C. 575 (1984). HPA 31a. The decision of the Tax Court in the *Hernandez* case is not reported. HPA 43a.

Graham v. Commissioner. The opinion of the Court of Appeals for the Ninth Circuit in the consolidated Graham, Hermann and Maynard appeals is reported at 822 F.2d 844 (1987). GPA 1a. The opinion of the United States Tax Court in this consolidated action is reported at 83 T.C. 575 (1984). GPA 36a. The Tax Court's decisions in the three cases are not reported. GPA 33a, 34a, and 35a.

JURISDICTION

Hernandez v. Commissioner. The decree of the Court of Appeals was entered on June 1, 1987. HPA 29a. A petition for rehearing was denied on July 15, 1987. HPA 30a. On October 6, 1987, Justice Brennan extended the time for filing a petition for certiorari to and including December 12, 1987. HPA 42a. The petition for a writ of certiorari was filed on December 11, 1987, and was granted on April 18, 1988. JA 147. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] References in this brief are indicated as follows:

To the numbered pages of the printed Joint Appendix (JA ——); to the numbered pages of the Appendix to the petition for certiorari in *Hernandez*: (HPA ——); to the numbered pages of the Appendix to the petition for certiorari in *Graham*: (GPA ——); to the numbered pages of the transcript from the Tax Court proceedings: (Tr. ——).

Graham v. Commissioner. The judgment of the Court of Appeals was entered on July 17, 1987. GPA 19a. A petition for rehearing was denied on December 1, 1987. GPA 20a. By order dated February 19, 1988, Justice O'Connor extended the time for filing a petition for certiorari to and including March 30, 1988. GPA 51a. The petition for writ of certiorari was filed on that date, and was granted on May 23, 1988. That Order also consolidated the *Graham* and *Hernandez* cases. JA 135. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The religion clauses of the First Amendment and pertinent portions of 26 U.S.C. § 170 and 26 U.S.C. § 501 are set forth in an Appendix to this brief.

STATEMENT OF THE CASE

The Nature of the Proceedings

In each of these cases, the Internal Revenue Service ("IRS") assessed tax deficiencies, denying charitable deductions claimed under § 170 of the Internal Revenue Code ("the Code") for payments made by the taxpayers in connection with their participation in religious practices of their church, the Church of Scientology.[2] The

[2] Petitioner Katherine Jean Graham was denied income tax deductions of $1,682.00 for contributions to the Church of Scientology Hawaii, and was assessed a tax deficiency in the amount of $316.24 for 1972. JA 11. Petitioner Richard M. Hermann was denied a tax deduction of $3,922.00 for similar payments to the Church of Scientology, American Saint Hill Organization, and was assessed a tax deficiency of $803.00 for 1975. JA 17. Petitioner David Forbes Maynard was denied a deduction for payments to the Church of Scientology, Mission of Riverside, totalling $5,000.00 (including a carryover of $2,385.00 for contributions made in 1976) and was assessed a tax deficiency of $643.00 for 1977. JA 23. Petitioner Robert L. Hernandez was denied an income tax deduction of $7,338.00 for contributions to the Church of Scientology, and was assessed a tax deficiency in the amount of $2,245.00 for 1981. JA 141.

taxpayers challenged the deficiencies in the Tax Court, and the cases of petitioners Graham, Hermann, and Maynard were consolidated for trial. Tr. 3. Petitioner Hernandez waived trial and, subject to his right of appeal, agreed to be bound by the relevant factual and legal findings of the Tax Court (excluding those relating to "subjective intent") in the designated *Graham* trial. JA 145.[3]

In the consolidated *Graham* case, the Tax Court upheld the Commissioner of Internal Revenue's ("the Commissioner's") disallowance, holding that petitioners' participation in religious services constituted a *quid pro quo* barring deduction of their payments. *Graham v. Commissioner*, 83 T.C. 575 (1984). GPA 36a. On appeal, the Ninth Circuit affirmed the decisions of the Tax Court. 822 F.2d 844 (1987). GPA 1a.

On the authority of *Graham*, the Tax Court entered its judgment in favor of the Commissioner in the *Hernandez* case. HPA 43a. On appeal, the First Circuit affirmed the Tax Court's decision. 819 F.2d 1212 (1987). HPA 1a.

Based on its opinion and decisions in the consolidated *Graham* cases and the parties' agreements to be bound by the outcome of that proceeding, the Tax Court entered judgments against other similarly situated taxpayers who were contesting tax deficiencies for their contributions to various churches and missions of the same religious denomination. Thereafter, similar appeals, based on records incorporating the same factual stipulations, have been decided by or are pending in eleven Courts of Appeals. In addition to the First and Ninth Circuits in the cases on review, panels of the

[3] In the *Hernandez* case (and in similar stipulated cases), the Commissioner of Internal Revenue and the petitioners stipulated in the Tax Court that the consolidated Graham, Hermann, and Maynard cases were typical and that, to the extent relevant, the record of those cases was to be incorporated into the record of all proceedings in petitioners' case. JA 145.

Fourth and Tenth Circuits affirmed the Tax Court's decisions. *Miller v. Internal Revenue Service*, 829 F.2d 500 (4th Cir. 1987), *petition for cert. filed*, March 1, 1988 (No. 87-1449) and *Christiansen v. Commissioner*, 843 F.2d 418 (10th Cir. 1988),[4] *petition for cert. filed*, June 10, 1988 (No. 87-2023). The Eighth and Second Circuits, however, reversed the Tax Court, holding that the payments were deductible. *Staples v. Commissioner*, 821 F.2d 1324 (8th Cir. 1987), *petition for cert. filed*, Feb. 19, 1988 (No. 87-1382) and *Foley v. Commissioner*, 844 F.2d 94 (2d Cir. 1988). (Counsel has been advised that the government will file a certiorari petition in the *Foley* case.)

Statement of Facts

The Commissioner and the taxpayers in both cases on review stipulated that Scientology, the faith whose sacraments are at issue here, is a religion and that the recipients of the contributions, Scientology missions and churches, were, at all relevant times, churches within the meaning of Internal Revenue Code § 170(b)(1)(A)(i) and tax-exempt religious organizations under §§ 170 and 501 of the Code eligible to receive deductible contributions. JA 38, ¶¶ 52, 53.[5]

Scientologists believe the enhancement of civilization is linked to their spiritual goals and practices. Adherents of this Church take part in the rituals of "auditing" and "training," the central practices of this faith. The payments at issue here were made in connection with the taxpayers' participation in these religious services.

[4] The West Publishing Company has erroneously captioned this case *Lee v. Commissioner*.

[5] At trial the taxpayers and the government entered into extensive stipulations of fact which were made part of the Tax Court's findings. 83 T.C. 575, 576. The stipulations filed in petitioner Graham's case (identical to the stipulations in the Hermann and Maynard cases, except for certain individualized facts, and made part of the record in the *Hernandez* case) are reprinted in the Joint Appendix. JA 29.

Auditing takes place one-on-one with the parishioner and a trained Church staff member known as an "auditor." JA 31, 32, ¶¶ 13, 14, 22. Adherents are taught that "the individual is an immortal spirit who has a mind and a body" and "that the highest level of spiritual ability and awareness can be obtained only by progressing on a step-by-step basis through lower and intermediate levels of Auditing." JA 31, ¶ 16. "Every Auditing session is structured and conducted in exact accordance with rituals, codes, doctrines and tenets of Scientology." JA 31, ¶ 15. Auditing is a standardized religious practice, not one designed to satisfy individual tastes or needs: the "structure, ritual and content of each auditing session" is based on the "level of attainment of the Scientologist being audited." JA 31, ¶ 17. No subject matter is taught, studied or learned during auditing. JA 32, ¶ 23.[6]

In training, the other religious practice at issue here, parishioners study "the doctrine, tenets, codes, policies and practices of Scientology" and study the scriptures of Scientology to the exclusion of all other materials. Tr. 111, 117-18, JA 45-46, 49-50; JA 32, ¶ 24. As part of training, a person may audit others. Tr. 111, 114, JA 45, 47. Scientologists undergo training to achieve religious enlightenment and the ability to help others (including the ability to audit another person). Scientologists believe that the spiritual benefits derived from auditing and training accrue not only to the individual but also to the public at large. Tr. 103-05, 115, 129-30,

[6] Dr. Thomas Love, Professor of Religious Studies, California State University at Northridge, California, gave his uncontradicted expert opinion that "auditing" is "the essential religious experience of the Church of Scientology." Tr. 291. Dr. Love testified that, as with Eastern religions such as Hinduism and Mahayana Buddhism, "the major emphasis" in Scientology "is upon affecting the world for good by obtaining one's enlight[en]ment and going out and hopefully assisting others to do the same." Tr. 298, JA 82. The government presented no expert testimony regarding the religious practices at issue.

166-67, 179-80, 203, JA 40-42, 48, 53, 60-61, 66-67, 70-71.[7]

The taxpayers testified that they had made their payments so that they or their children could participate in religious services and because they wanted to support the religious goals and projects of their church. Tr. 166-67, 203, 208, 260-61, JA 60-61, 70-72, 75-76; Tr. 175. None of the taxpayers received any material goods or secular services with respect to the payments at issue.

In accordance with the stipulations and testimony, the Tax Court found the practices at issue to be religious. 83 T.C. at 580, 581 ("Petitioners wanted to receive the benefit of various religious services provided by the Church of Scientology. . . . Petitioners Graham and Hermann made payments for which they received religious services. . . . Petitioner Maynard made advance payments . . . [that] entitled him to receipt of [such] services in the future.") As the Second Circuit stated in an affiliated case: "auditing and training are *the* religious practices of the Church of Scientology." *Foley*, 844 F.2d at 97 (emphasis in original).

The Churches of Scientology have established a schedule of payments for auditing and training and refer to such payments as "fixed donations" or "fixed contributions."[8] JA 34, ¶ 36. Advance payments are encouraged and refunds are sometimes made for unused payments. 83 T.C. at 578. The Churches promote participation in their religious services, using such techniques as free lectures, handouts and media advertising, but they do not actively solicit contributions from members or from the public other than through fixed donations for participation in these religious services. JA 34, ¶ 41; 83 T.C. at 579.

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[7] Dr. Love testified that "training" is a form of religious observance, comparable to devotional study of sacred texts in the Buddhist and Judaic traditions. Tr. 314-17, JA 92-94.

[8] Auditing, for example, is given in sessions. An "Intensive" is a specific number of hours—12½ or 25—intended to be given over a short period of time. JA 31-32, ¶ 21.

Although the Churches perform a variety of services for their members without charge, including weddings, christenings, and funerals, and offer a specialized form of auditing to help people in crisis for which no donation is expected, participation in the religious services of auditing and training generally is conditioned on fixed donations. Such payments, the major source of funding for the Church, are at issue here. JA 34, ¶¶ 39, 40. *See also* Tr. 136-39, 199-200, JA 55-58, 67-68; 83 T.C. at 578.

The Tax Court found that the Church's system of fixed donations is the application of a religious doctrine, "the Doctrine of Exchange." 83 T.C. at 577. Amounts of fixed donations traditionally have been set at levels that correspond roughly to a percentage of the income of church members. For example, the Tax Court found that 25 hours of auditing historically has correlated with three months' pay for average middle-class workers in the church district. 83 T.C. at 578 n.7. Dr. Love's uncontradicted expert testimony established that such fixed or prescribed fees for participation in religious practices are comparable to "seat fees" in the Jewish faith, pew rentals and Mass fees in the Protestant and Catholic traditions, and tithing in Mormonism. Tr. 302-04, 305-08, 311-13, JA 84-86, 87-89, 91-92.

SUMMARY OF ARGUMENT

1. For nearly 70 years, the Internal Revenue Service has allowed charitable contribution deductions under § 170 of the Internal Revenue Code for individuals' payments to churches and synagogues to participate in the sacraments of their faiths, regardless of whether the amounts of payment are determined by the individual or set by the religious organization. The decisions on review thus reverse decades of consistent administrative interpretations, which have never been questioned by Congress nor formally abandoned by the IRS and which are solidly grounded in the language, legislative history and policies of the Internal Revenue Code. The decisions below improperly apply legal doctrines, which evolved to

protect against tax abuses when purchases of secular goods and services are disguised as charitable contributions, by extending to religious services principles announced by this Court in *United States v. American Bar Endowment*, 477 U.S. 105 (1986), a case involving deductions claimed for insurance premiums. Extension of *American Bar Endowment* to disallow deductions for the religious practices at issue here treats religion as if it were a secular commodity and requires the IRS and the courts to place an economic value on religious services, a task that is both impractical and unconstitutional.

2. The Commissioner stipulated and the Tax Court found that the recipients of the donations at issue here, various missions and churches of the Church of Scientology, are tax-exempt churches, eligible to receive deductible contributions under § 170, and that the donations were structured by the Church in accordance with religious doctrine and were made by the individual taxpayers solely for religious services and for the financial support of their church. Neither the "form" or "structure" of this system of fundraising, nor the nature, quality or value of the religious services received by members in return, provides a principled basis for distinguishing the payments at issue here from payments by millions of Americans to the churches and synagogues of other religious denominations—payments for which the IRS consistently has allowed deductions. Fixed payments, individualized worship services, and promises of personal benefits in return for religious faith and practice are common to many religions. For example, Mass stipends in the Catholic faith, pew rents in Protestantism, tithes in Mormonism, and annual dues, High Holy Day tickets, and Passover fees in Judaism—fund-raising practices involving payments fixed by the church or synagogue and grounded in religious doctrines and customs —are all analogous to the fund-raising practices at issue here.

The Eighth Circuit reaffirmed the long-held IRS policy and reached the correct conclusion in one of the associated cases:

> [W]e conclude that regardless of the timing of the payment or details of the church's method of soliciting contributions from its members, an amount remitted to a qualified church with no return other than participation in strictly spiritual and doctrinal religious practices is a contribution within the meaning of section 170.

Staples, 821 F.2d at 1327.

The unprecedented position advocated by the Commissioner here presents a striking departure from longstanding IRS interpretations of § 170. Neither the lower courts nor the government have cited a case, other than those involved in this litigation, in which a taxpayer has been denied a charitable deduction for payments made solely to participate in religious services.

The IRS now seeks a license to select at will those payments for religious services it will allow to be deducted and those it will not. This departure from traditional principles of tax administration is unwarranted and unjustified by any valid distinction between the fund-raising practices of Scientology and those of other religions.

3. The traditional policy that allows deductions for payments to churches and synagogues in return for participation in central worship services is a valid accommodation of the religious interests of individual believers. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). The Commissioner's unilateral abandonment of that policy violates the religion clauses of the First Amendment. The decisions below raise the specter of entanglement between government and religion, created by the need to place a monetary value on religious services and to evaluate the "structure" of church fund-raising practices based on religious doctrine. Furthermore, the taxation only of fixed payments of Scientologists or of their individual form of worship establishes an unconstitutional denominational preference, *Larson v. Valente*, 456 U.S. 228 (1982), placing a stamp of state approval on churches

that do not specify costs of membership or that worship congregationally.

ARGUMENT

I. THERE IS NO PRINCIPLED DISTINCTION BETWEEN THE PAYMENTS OF SCIENTOLOGISTS AND A WIDE VARIETY OF OTHER PAYMENTS TO RELIGIOUS DENOMINATIONS—NONE OF WHICH HAS HAD ITS DEDUCTIBILITY CHALLENGED BY THE IRS.

A. Seventy Years of Consistent IRS Interpretations of § 170 Support Deductibility of Fixed Payments.

From the early days of the income tax until this litigation, the IRS consistently has allowed deductions under § 170 (and its predecessors) for payments made by individuals to churches and other religious organizations for participation in their sacraments. Accordingly, the IRS has issued pronouncements explicitly allowing deductions even when receipt of religious services depends upon the payment of pew rentals, assessments or periodic dues. *See* A.R.M. 2, 1 C.B. 150 (1919) ("In substance it is believed that these [along with 'basket collections'] are simply methods of contributing, although in form they may vary"); Rev. Rul. 70-47, 1970-1 C.B. 49 (reaffirming A.R.M. 2).

The reaffirmation of the principles of A.R.M. 2 in Revenue Ruling 70-47, issued half a century later, made it clear that the IRS would not challenge individuals' payments, regardless of their form, to churches or synagogues to participate in religious services, nor, in the case of religious services, would the IRS follow its usual practice of attempting to offset charitable contribution deductions by the value of secular or economic benefits received in return.[9] Revenue Ruling 70-47 remains in force today.

[9] The 1970 issuance of Rev. Rul. 70-47 is particularly significant since it postdates the IRS's promulgation of Rev. Rul. 67-246, 1967-2 C.B. 104, the key ruling on disallowance of all or part of charitable contributions made in exchange for economic benefits from secular charities, and Rev. Rul. 68-432, 1968-2 C.B. 104, a ruling detailing various instances where membership dues to secular charities are deductible only in part, because the deduction is reduced by the "monetary value" of secular benefits to members. Subsequent administrative pronouncements have been favorable to religious payments. *See, e.g.*, Rev. Rul. 78-366, 1978-2 C.B. 241 (estate tax charitable deductions allowed for bequest to church to say Masses for decedent's family); Rev. Rul. 76-323, 1976-2 C.B. 18 (allowing deductions for payments of entire income from outside employment to religious order as condition of membership); Rev. Rul. 71-580, 1971-2 C.B. 235 (allowing tax exemption as religious organization to family corporation organized to compile genealogical information on family members in order to perform religious sacraments). If the payments are made to a church, synagogue or other religious organization tax-exempt under § 501(c)(3) (or its predecessors) and eligible to receive deductible contributions under § 170(b)(1)(A)(i) and § 170(c)(2) (or their predecessors), the form of such payments or the nature or value of the religious services received in return always have been treated as irrelevant or "incidental" if the payment was for participation in religious practices. Even payments that are fixed and/or required as a condition of receiving a religious service, routinely are deductible under § 170. See Section II, *infra*.

As a result of the prior IRS practice of uniformly allowing deductions under § 170 for payments to churches such as those at issue here, the question before this Court has not been litigated previously. However, the holdings of the Tax Court and affirming Courts of Appeals—that receipt of a strictly religious benefit is a substantial "financial or economic benefit" and a "*quid pro quo*" requiring denial of the taxpayers' charitable deductions—are a striking departure from seven decades of consistent IRS interpretations. As the Eighth Circuit noted in *Staples*, 821 F.2d at 1326, "[n]either the Tax Court nor the government has cited a case in which a taxpayer has been denied a deduction for payments keyed to participation in strictly religious practices."

The Courts of Appeals that have affirmed the Tax Court's decision have extended *United States v. American Bar Endowment*, 477 U.S. 105 (1986)—which disallowed charitable contribution deductions for insurance premiums in connection with a trade or business unrelated to any tax-exempt activity—to deny deductions for payments made by individuals to their churches solely to

participate in religious services. These courts held that deductions would be allowed only if the taxpayer could show that the amounts paid exceeded the *value of the religious benefits* obtained in return.[10] *Hernandez*, 821 F.2d at 1217; *Graham*, 822 F.2d at 849; *Christiansen*, 843 F.2d at 420-21; *Miller*, 829 F.2d at 503-04. *See also Foley*, 844 F.2d at 98-99 (Newman, J., dissenting). Three affirming courts explicitly grounded their disallowance of the deductions on the "structure," "external features," or "circumstances" of the "transaction." *Graham*, 822 F.2d at 848-49; *Christiansen*, 843 F.2d at 420; *Miller*, 829 F.2d at 505.

To the contrary, the Eighth and Second Circuits held that "participation in strictly spiritual and doctrinal religious practices" is not the kind of "material, financial or economic" benefit that would constitute "adequate consideration" to deny charitable deductions under *American Bar Endowment*. *Staples*, 821 F.2d at 1327; *Foley*, 844 F.2d at 96-97. *See also Christiansen*, 843 F.2d at 421 (Seymour, J., dissenting). As the Eighth Circuit put it:

> [W]e conclude that regardless of the timing of the payment or details of the church's method of soliciting contributions from its members, an amount remitted to a qualified church with no return other than participation in strictly spiritual and doctrinal religious practices is a contribution within the meaning of section 170.

Staples, 821 F.2d at 1327.

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[10] Each of these appellate courts applied the *American Bar Endowment* test—"[t]he *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration" (477 U.S. at 118)—to deny the deductions. *Hernandez*, 819 F.2d at 1216-18; *Graham*, 822 F.2d at 849; *Christiansen*, 843 F.2d at 420; *Miller*, 829 F.2d at 503. They concluded that participation in religious services constituted "adequate consideration" to deny the deductions, holding that receipt of religious benefits should not be distinguished from receipt of secular benefits.

Regardless of outcome, each appellate court at least acknowledged that the First Amendment's command of neutrality among religious denominations requires an identical legal standard to be applied whenever individuals make payments to churches or synagogues and expect to receive religious services or benefits in return. As the Tenth Circuit put it: "The relevant question is whether the taxpayer *expected a benefit* in return for the payment; deductibility does *not* depend on what type of benefit the taxpayer received." *Christiansen*, 843 F.2d at 420 (emphasis added). The dissenting judge in that case observed that a decision in favor of the government has "ominous implications for all religious institutions." *Id.* at 421 (Seymour, J., dissenting). None of the affirming appellate courts, however, has squarely faced the challenges to other religions implied by their decisions.[11]

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[11] *Graham*, 822 F.2d at 850 ("We are not convinced that [rulings and case law allowing deductions for payments to participate in religious services] would comport with the analysis of section 170 that we have set forth here."); *Hernandez*, 819 F.2d at 1227 ("[W]e have some doubt as to the continuing validity of the presumption in Rev. Rul. 70-47, 170-1 C.B. 39 [sic], that pew rents and mandatory church dues are tax deductible gifts."); *Christiansen*, 843 F.2d at 420 ("We agree with the First Circuit that application of the *American Bar Endowment* standard could create practical and constitutional difficulties in some cases."); *Miller*, 829 F.2d at 505 ("We have no reason to believe that the IRS will fail to apply the principles that *emerge from this litigation* in its treatment of other religious groups.") (emphasis added); *Foley*, 844 F.2d at 98 (Newman, J., dissenting) ("Payments for pew rentals and attendance at High Holy Day Services are close to the line, and as the Ninth Circuit has observed, not all of the Commissioner's prior rulings in this area may be defensible.").

The Eighth Circuit agreed that previous IRS rulings would be invalidated by upholding the disallowance of deductions in these cases: "If the [Scientologists'] payments were not contributions, then 'the passing of the collection plate in church would make the church service a commercial project.'" *Staples*, 821 F.2d at 1327 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)). *See also Foley*, 844 F.2d at 96-97 ("Donations related to participation in religious observances, however, have not been regarded as yield-

B. The Fixed Donations At Issue Here Are Grounded In Religious Doctrine And Are Indistinguishable Legally From Fund-Raising Practices Of Other Faiths.

1. *Neither Scientology Fund-Raising Practices Nor The Nature Of The Religious Services Received By Scientologists Provides Any Basis For Singling Out Members of This Faith For Disallowance Of Charitable Deductions.*

As in most other churches and religious organizations, donations from adherents provide the majority of Scientology church funds and are used to pay the costs of operations and activities of the church. *Graham*, 83 T.C. at 578. The Tax Court found that the fixed donation method of funding church operations and activities is based on a religious tenet called the "Doctrine of Exchange." 83 T.C. at 577.[12] Many mainstream Christian and Jewish churches and synagogues traditionally have used fixed payments in exchange for participation in religious services as a fund-raising device.

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ing specific private benefits to the donor, who is considered only an incidental beneficiary, the primary beneficiaries of the observances being the members of the faith and the general public. . . . [T]here is no way of measuring spiritual or religious benefits in such a way as to conclude that they are 'commensurate' with the fees paid for participation in the religious activities giving rise to those benefits.")

[12] The Doctrine of Exchange, based upon early writings of the founder of the Church of Scientology, generally relates to the need to "balance inflow and outflow" (or, put another way, the need to give as well as receive). Tr. 136-37, 202-03, JA 55-56. A person must outflow to maintain a balance and to be an ethical Scientologist. Tr. 202-03, JA 69-71. A person who receives but does not contribute or exchange something in kind will suffer spiritual decline. Tr. 136, 203, JA 70-71. The Doctrine of Exchange operates in many personal realms of a Scientologist's life, including, for example, relationships and responsibilities with respect to one's children or community, in addition to providing the doctrinal basis for the fixed donations at issue here. Tr. 202-03, JA 69-71. The Tax Court specifically found that the "Church of Scientology applies this doctrine by charging a 'fixed donation' for training and auditing." 83 T.C. at 577.

The Church of Scientology, of course, is not unique either in grounding its method of soliciting funds in religious doctrine—particularly in religious doctrine that applies also to other aspects of a member's religious experience and life—or in promising both spiritual and secular betterment from participation in religious activities. As the review of traditional Christian and Jewish fund-raising practices set forth below illustrates, exhortations, pressures and even requirements of financial commitments to churches or synagogues are common to many mainstream Western faiths and constitute an essential means both of fundraising and regulating members' behavior.

Nor does the nature of the religious practices or the benefit received provide any legal basis for disallowing deductions for these payments. Practitioners of mainstream Biblical religions routinely are promised rewards for their faithful *and financial* participation in the beliefs and practices of their churches. Numerous churches proselytize by promising personal benefits to members such as jobs, better health and solutions to personal problems, among others. Tr. 309-11, JA 89-91. Religious people of all faiths expect substantial personal and spiritual benefits from participating in their religions' sacraments. But expectations of such gains from religious giving have never before precluded deduction of payments under § 170, despite the fact that participating in religion may bring peace of mind or even better work habits.

Nevertheless, the Ninth Circuit regarded the emphasis on private and individual benefits found in the literature of this church as a ground for disallowing the deductions.[13] Such emphasis on the individual is understand-

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[13] The Ninth Circuit opinion suggests that church literature stating that the individual "is the direct and primary beneficiary" of the religious practices that "are the fruits of his payments" renders the payments nondeductible. *Graham*, 822 F.2d at 850. To the contrary, the First Circuit in *Hernandez* asserted explicitly that the individual rather than group setting of the religious services of the Church of Scientology "is completely irrelevant to the statutory

able, however, given that the religious services at issue here are provided on an individual basis, rather than in the congregational setting of most Western religions, and in light of this religion's affinity to Eastern religions, notably Buddhism.[14]

Indeed, auditing is analogous to the Christian practices of "spiritual direction" [15] and confession, recognized

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inquiry." 819 F.2d at 1219. The *Hernandez* court, however, suggested that an individual setting might affect the costs of the religious services, *id.*, and that such costs might be an important determinant of the value of the religious services received and therefore of the amount of allowable deductions. *Id.* at 1217. The court in *Hernandez* also acknowledged that the individual nature of the religious service had been an important factor in the IRS's decision to disallow the deductions here:

> The IRS found significance in the fact that unlike the collective worship services obtained in exchange for pew rents and, to a large degree, membership dues, auditing and training services are performed in private sessions.

Id. at 1227.

The IRS's distinction between group ("congregational") religious services and individual religious services in interpreting § 170 is of great significance because the IRS enjoys a presumption of correctness in tax cases. *See Welch v. Helvering*, 290 U.S. 111 (1933); Rule 142, Rules of Practice and Procedure of the U.S. Tax Court.

[14] Analogies between the tenets of Scientology and Buddhism are contained in the uncontradicted expert testimony in the trial court as well as in the church's literature and that of commentators. *See* Tr. 303-10, JA 85-90 (Testimony of Dr. Love); Church of Scientology, *Scientology: A World Religion Emerges in the Space Age* 9-11 (1974) (detailing similarities between Scientology and Buddhism); and Flinn, "Scientology as Technological Buddhism," in *Alternatives to American Mainline Churches* 100 (J. Fichter, ed. 1983) (noting that Scientology "looks inward for the illumination of the sacred" rather than "looking upward for a revelatory experience which is deemed beyond human capacity").

[15] Spiritual direction involves working with a spiritual preceptor who uses his or her knowledge of spiritual development to guide his or her disciple on the path to the spiritual goal. 14 *The Encyclopedia of Religion* 29 (M. Eliade, ed. 1987). This practice has prominence particularly in Catholic and Episcopal churches.

also across religious traditions.[16] The expected benefits of auditing have been "compared to the Christian sequence sin/justification or sin/forgiveness through grace," although "[c]onsistent with its Buddhist-like notion of inner enlightenment, Scientology holds each member responsible." Flinn, "Scientology as Technological Buddhism," in *Alternatives to American Mainline Churches* 103-04 (J. Fichter, ed. 1983).[17] Regardless of denomination or the individual or congregational nature of core religious practices, religious people expect substantial individual spiritual benefits to flow from participation in their religions. The benefits expected by the church members in this case, such as the ability to deal with people more effectively, are similar to the benefits of religious belief and practice for many individuals, and are analogous to the rewards promised throughout the Bible for faithfulness.

See, for example, 3 Sisters of St. Joseph of Philadelphia, *Encyclopedic Dictionary of Religion* 3367 (1979), where "spiritual direction" is called a "form of ministry by which one person guides another in the way of evangelical perfection." *See also* M. Thornton, *Spiritual Direction* 14 (1984) ("spiritual direction is unashamedly individualistic because it guides and develops that individuality without which corporate action and influence by the organic Church is impossible.").

[16] In both Christianity and Jainism, individual confession to a priest or guru is essental to religious practice. 4 *The Encyclopedia of Religion* 1, 4, 6 (M. Eliade, ed. 1987). In Catholicism failure to confess may result in estrangement from the Church as a result of exclusion from the Eucharist. K. Rahner & H. Vorgrimler, *Dictionary of Theology* 370-75 (1981).

[17] Contrary to the implication in *Graham*, 822 F.2d at 850, auditing is not designed to satisfy individual tastes or needs. The stipulations indicate that auditing is standard, with the structure, ritual and content of each session determined by religious rituals, tenets and doctrines and the "level of attainment of the Scientologist being audited." JA 31, ¶¶ 15, 17. The auditor responds according to prescribed tenets of the religion and never by analyzing the individual's personal situation. Tr. 108-110, JA 43-45 (testimony of Reverend Bruce Gaines, a Scientology minister).

As the following review makes clear, fund-raising practices of familiar Western churches and synagogues are comparable to Scientology's practice of "fixed donations" for specific religious services. In mainstream churches and synagogues, neither expectations of individual spiritual gain from religious giving nor the fact that the amount of donation is fixed by the church have ever before precluded deductions under § 170. Moreover, neither the Internal Revenue Code nor its policies permits a distinction between individual and congregational worship in determining deductibility under § 170. Finally, such a distinction would condition tax benefits on the tenets of a particular denomination in contravention of the First Amendment. *See, e.g., Larson v. Valente*, 456 U.S. 228, 244 (1982) and Section III, *infra*.

2. *Mainstream Christian And Jewish Denominations Raise Funds Through Fixed Payments Linked To Specific Religious Services.*

a. *Christian Fund-Raising Practices.*

Mass Stipends. The Catholic practice of individual payments, fixed in amount by the church, for Masses said in the name of an individual payor or for the "purpose" or "intention" of the payor ("Mass stipends") has a long tradition, apparently originating in the antiquated practice of granting indulgences for almsgiving.[18] A "Mass stipend" is a monetary offering made for celebration of a Mass "for the intention specified by the donor."[19]

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[18] Although indulgences—the remission of punishment due to sins—have been granted by the Catholic Church for the performance of acts, the payment of funds was among the specified conditions that could produce the relaxation of sacramental penances or the commutation of penalties required by the Church. *Encyclopedic Dictionary of Religion, supra,* at 1797. Abuses led to the elimination of "sales" of indulgences 1567. *Id.* For a discussion of the relationship between indulgences and the saying of votive Masses, *see* H. Lea, *A History of Auricular Confession and Indulgences in the Latin Church* 89 (1896).

[19] *Encyclopedic Dictionary of Religion, supra,* at 3394. A priest who accepts a Mass stipend "incurs a grave obligation to apply the fruits of the mass according to his agreement with the donor." The

An admixture of theological and fund-raising considerations has required that the payment of funds precede the saying of the Mass or Masses.[20] The contractual nature of Mass stipends in no way suggests that the value of the religious benefit—the "priceless fruit of Holy Mass"—turns on the amount paid: "[T]here need not be any proportion between the value of the stipend and the value of the Mass." Keller, *supra,* at 27, 26.

The amount required to be paid for Mass stipends was set historically by diocesan statute or local custom and now is set by provincial council or a meeting of a province's bishops.[21] Masses said at privileged altars

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seriousness of both the contractual undertaking by the priest and the "loss or injury" to the "giver of the stipend" are such that it is a "mortal sin to omit even one mass charged for a stipend." Keller, *Mass Stipends* 25-27 (Ph.D. Dissertation 1925). Keller emphasizes the contractual nature of this fund-raising practice and elaborates the ecclesiastical laws regulating such contracts, noting that:

> Mass stipends belong to that class of bilateral innominate contracts which is known as "do ut facias." This means that one party agrees to give something whilst the other party agrees to do something in return.

Id. at 25. Keller's interpretation of Mass stipends as *do ut facias* contracts under the Canon law in effect from 1917-1983 are confirmed in J. Coriden, T. Green & D. Heintschel, *The Code of Canon Law: A Text and Commentary* 668 (1985) (explaining the 1983 revision of Canon Law concerning Mass stipends).

[20] Keller, *supra,* at 56 (footnote omitted):

> The practice of celebrating a Mass before it has been requested and later accepting an offering for that Mass, deters the faithful from giving stipends, because the people suspect that priest of taking the money without discharging the obligation imposed by its acceptance. Moreover, it prevents the giver of the stipend from attending the Mass or at least from disposing himself more perfectly by contrition, Confession or Communion, to profit by the fruits of that Mass.

[21] *See* Coriden, Green & Heintschel, *supra,* at 670-71 (Canon 952) (noting that the change from local to provincial setting of amounts to be paid was to promote "uniformity of practice among neighboring dioceses").

sometimes have commanded higher stipends, and advance payments are acceptable if no more is accepted than for masses that can be said in one year. *Id.* at 74, 113 (citing Canon 835). If the money paid for saying Mass is lost or stolen, the Mass must nevertheless be said or the money refunded.[22]

Pew rents. Apparently dating from the 16th century, a pew rent is a charge levied upon an individual or family for using specific pew space at religious services. *Encyclopedic Dictionary of Religion*, *supra*, at 2760. Pew rents were at one time an important source of church revenue in the United States, but generally were abandoned in the first half of the 20th century. *Id.* Pew rents have been replaced by "seat collections," a fund-raising practice that does not involve reservation of specific space, relying instead on collections at each service rather than on less frequent collections, such as annual. *Id.* at 2760, 3236.[23]

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[22] *See* Keller, *supra*, at 81-82 (citing Canon 829) ("[I] seems that according to Canon law the giver of a stipend has a right to demand either the money or the celebration and application of a Mass.") (footnote omitted).

[23] Many Protestant denominations use "every person visits" or "every member visits"—individual visits to each church member by pastors or well-trained church stewards—as an important fund-raising technique. *See, e.g.*, O. Pendleton, Jr., *New Techniques for Church Fund-raising* (1955); T. Thompson, *Handbook of Stewardship Procedures* (1964); United Church of Christ, *Money for the Church's Ministries: Basic Resourcebook* (1980). The individual nature of such appeals, which often request a predetermined contribution as an affirmation of church membership, confirms that fundraising, including discussion of the rewards of church membership, is often conducted on an individual basis even in congregational churches. As with other forms of church fundraising, interconnections between benefits of faith and payments to the church are emphasized. The Thompson book, for example, includes 131 Biblical references that are suggested as potential bases for "stewardship sermons" by pastors and "ten new stewardship hymns." Thompson, *supra*, at 101-15. *See also* the supplement to the *Basic Resourcebook*, *supra*, entitled *Money for the Church's Ministries: Surveying the Biblical Basis and Engaging in Worship* (1980) (elaborating on the correlation between faith and financial support).

Tithes. Tithing—paying a given percentage of one's income to the church—has long been an important source of funds for certain churches, one with direct Biblical linkage.[24] Whether tithing is a requirement or a voluntary offering has varied among religious denominations and across time.[25]

Mormons, for example, must tithe ten percent in accordance with that church's "worthiness" standards to obtain a "temple recommend," a prerequisite to admission to the temple. *See Corporation of the Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2865 n.4 (1987). Mormon temples play a "critical role" in Mormon life; it is in these temples that the most important rituals are performed, such as baptisms of the living and the dead and rites that bind members to their unique church traditions. Tithing is enforced through the rigorous questioning of those seeking temple recommends, through reports of ward bishops and, for church employees, through payroll records. J. Heinerman & A. Shupe, *The Mormon Corporate Empire* 96-97, 102-03 (1985). *See also* Reorganized Church of Jesus Christ of Latter-Day Saints, *The Priesthood Manual* 278 (1982) ("The presenting of the tithing statement is . . . an act of worship.")

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[24] *See, e.g., Deuteronomy* 14:22 ("You shall tithe all the yield of your seed, which comes forth from the field year by year").

[25] Tithing was the law of the early Christian church, officially required of all members from the year A.D. 585. *See* Knox, "The Ministry in the Primitive Church," in *The Ministry in Historical Perspectives* 30 (H. Niebuhr & D. Williams eds. 1953), *quoted in* D. Johnson, *The Tithe: Challenge or Legalism?* 45 (1984). For more than a thousand years, tithing was legally enforced in western Europe. T. Thompson, *Handbook of Stewardship Procedures* 19 (1964). Tithing continues to be strongly encouraged by many churches and required by some. *See, e.g., id.*; R. Kendall, *Tithing: A Call to Serious Biblical Giving* (1982) (contending that tithing is "required" for all Christians). *Cf.* H. de Mena, Jr., *How to Increase Parish Income* (1982) (urging voluntary tithing, to be encouraged through professional fund-raising mailers and personal visits by the priest to each parishioner).

In addition to the fund-raising advantages to churches that accrue from tithing and the spiritual gains to the payor, material benefits also are sometimes asserted to flow from tithing. See, for example, R. Kendall, *supra*, at 21, where the author states:

> [w]e have a number of rather plain statements that . . . clearly point to the material return [for tithing] as one kind of blessing from the Lord. Obviously some will prosper more than others, owing to gifts, place of responsibility, or opportunity. But at the bottom of it all is a promise for all believers that they will be honored even at a material level in such a way that . . . is more than it would have been had they not been faithful in Christian stewardship.

b. *Jewish Fund-Raising Practices.*

As with other religions, Jewish fund-raising practices are grounded in religious beliefs, traditions and customs. Such practices vary not only among the main religious categories—Orthodox, Conservative and Reform—but also among synagogues and temples within these categories and, for example, often depend upon customs based on geographic origin. Moreover, as with Christian churches, Jewish fund-raising practices have changed over time, often responding to changes in religious or secular aesthetics. Because ancient Jewish law forbids the handling of money on the Sabbath or High Holy Days when attendance is greatest, synagogues rely less than Christian churches on Sabbath collections, but emphasize instead annual membership dues, sales of High Holy Day seats and tickets, payments for Torah honors and fees for other religious services.

Annual Dues. Annual dues provide an important source of income for many synagogues, ranging recently, for example, from about 20 percent to 100 percent of annual income of Reform temples.[26] Historically, annual

[26] J. Feldman, H. Fruhauf & M. Schoen, *Temple Management Manual* Ch. 4 at 9 (1984). Where dues are not all-inclusive, additional funds are raised, for example, from the sale of High Holy Day seats or tickets.

dues were "fixed dues" per individual or family with rates set by the boards of trustees of individual synagogues.[27] In some Reform temples, the fixed fee system recently has been replaced by dues that vary with family income.[28]

High Holy Day Tickets. Analogous to Christian pew rentals, many synagogues charge separate fees for High Holy Day seats or sell High Holy Day tickets with admission often restricted to ticket holders.[29] Some congregations relate charges to "the number of, and in some cases the location of High Holy Day seats." *Temple Management Manual*, *supra*, Ch. 4 at 10. In 1982 typical fees for High Holy Day seats ranged from $200 to $2,000 and for High Holy Day tickets from $50 to $500. Harris, "The Squeeze on Churches and Synagogues" Money Magazine 97, 104, (April 1982).

[27] "[E]very membership unit was required to contribute the same amount of annual dues, regardless of composition (husband/wife/children), financial standing or ability." *Id. See also* H. Dobrinsky, *A Treasury of Sephardic Laws and Customs* 166, 204 (1986) (while Syrian Jews pay both "a regular membership fee" and purchase permanent seats in the synagogue, the annual fee in Spanish and Portuguese congregations entitles one to both "membership and a seat in the congregation").

What a member receives in exchange for annual dues, of course, varies among congregations. Many congregations, for example, include religious schooling in annual dues, while others levy separate charges "ranging from a modest book fee of a few dollars to one in the hundreds of dollars." *Temple Management Manual, supra*, Ch. 4 at 11. *See also* M. Sklare, "The Sociology of the American Synagogue," in *Understanding American Judaism* 94-95 (J. Neusner ed. 1975).

[28] *See Temple Management Manual*, Ch. 4 at 9 (The "congregation establishes a table of dues based on income levels . . . and each member is required to pay dues according to the plan.").

[29] *See, e.g.*, M. Sklare, *supra*, at 95-96:

> While daily services, Sabbath services, and festival services are open to all, the demand for seats on the High Holidays is so large that admission is commonly restricted to ticket holders. In some congregations tickets are distributed only to members while in other synagogues they are sold to the public, but at a higher price than the charge made to members.

"Auctioning" of Torah Readings. In certain synagogues the honor of reading the Torah (*"aliyot"*) traditionally has been sold, although the methods of auctioning and negotiating the payments for such religious honors vary among synagogues.[30] Some rabbis have urged changes to minimize disruptions to religious services from auctioning, "claiming that it made the synagogue look like a marketplace." Dobrinsky, *supra*, at 177.[31] Nevertheless, Torah readings remain an important fund-raising source for many synagogues.[32]

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[30] The following excerpt describes the practice in Jewish synagogues of Syrian descent:

> The *mizvot* (*aliyot* and other honors) are auctioned off in the synagogue for the holidays. Numbers such as 26 (which is the numerical equivalent of YKVK, the name of God), 101 (which is the numerical equivalent of the name Michael, the angel), and 202 (which symbolizes twice 101) are used in the auctioning. The auctioneer encourages the congregants to generously donate for the *mizvot* by stating, "And whoever gives more, God will give him more" . . . In some synagogues, they now discourage the process of auctioning the *mizvot*, and instead make arrangements prior to the holidays for these honors to be acquired in advance by members of the congregation. When there is more than one person vying for a particular honor, the matter will be negotiated in private.

H. Dobrinsky, *supra*, at 164.

[31] In synagogues of Moroccan descent, for example, the auction is conducted only twice a year and the person who buys the particular Torah reading for the six-month period has "the right to give it to any of his friends." Dobrinsky, *supra*, at 177. The biannual auction was in response to complaints by rabbis. Some congregations no longer auction Torah readings, but otherwise arrange for payments from individuals permitted this special participation in the Jewish religious service. *Id.* at 68. In Reform congregations, " auction of synagogue honors" disappeared in the 19th century "as alternatives were found for the revenues it raised." M. Meyer, *Response to Modernity: A History of the Reform Movement in Judaism* 170 (1988).

[32] *See* M. Zborowski & E. Herzog, *Life Is With People: The Culture of the Shtetl* 55 (1972 ed.):

> All readings are marked by some donations . . . . If . . . a man of substance has lagged in his contributions to the community welfare, one way of prompting him to open his pocket is to call him to the reading of the Torah. No one can refuse a call to the Torah . . . .

Fees for Religious Services. Like a variety of other religious organizations, synagogues sometimes use special fees to raise funds, such as special fees to participate in a Passover service and meal. *See Temple Management Manual, supra*, Ch. 4 at 11 (1984).

C. The Decisions Below Grant The IRS A License Selectively To Disallow Individuals' Deductions For Payments Solely To Participate In The Religious Services Of Their Faiths.

Neither the "form" or "structure" of the Church of Scientology's system for raising funds from its adherents, nor the nature, quality or value of the religious services received by members in return, provides a principled basis for distinguishing the payments at issue here from payments made by millions of religious Americans to the churches and synagogues of other religious denominations—payments for which the IRS consistently has allowed deductions under § 170. For example, annual dues to churches and synagogues explicitly are permitted deduction without any inquiry into the nature or the value of religious services received in return by the payors.[33] A.R.M. 2, 1 C.B. 150 (1919) and Rev. Rul. 70-47, 1970-1 C.B. 49. Despite their "rental agreement" form or "structure," and the individual benefits that obtain, the IRS always has allowed charitable deductions for payments for specific church pews. *Id.* Likewise, notwithstanding the "structure" of Mass stipends as fixed payments for specific religious services performed for the "intention" of the payor, the IRS specifically has allowed charitable deductions of such payments to a church. *See* Rev. Rul. 78-366, 1978-2 C.B. 241. Deductions also are

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[33] This contrasts with IRS disallowance, at least in part, of membership dues to secular charities where economic or secular benefits are received in return. Rev. Rul. 68-432, 1968-2 C.B. 104.

routinely permitted for High Holy Day tickets,[34] tithes,[35] payments in connection with Torah readings, fees for special religious services, such as Passover,[36] and other payments to participate in the religious services of churches and synagogues.[37] Now the IRS seeks a license

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[34] At least to one judge, High Holy Day tickets are "close to the line." *Foley*, 814 F.2d at 98 (Newman, J., dissenting).

[35] The instant litigation, of course, casts doubt on the continued deductibility of tithes to churches. *See, e.g.*, Deputy Assistant Attorney General Michael Durney, Address to the 24th Annual Washington Non-Profit Tax Conference, *Tax Notes Today*, March 4, 1988 (noting that the instant litigation is of concern to mainstream religions as well as smaller denominations, "especially those that strongly encourage tithing"). In fact, the form of payment in *Murphy v. Commissioner*, 54 T.C. 249 (1970), a case disallowing deduction for payments to receive adoption services, was equivalent to a tithe, an amount equal to ten percent of the taxpayer's income. *Murphy* was cited in *United States v. American Bar Endowment*, 477 U.S. at 117, and was relied upon by the appellate courts below. *See Hernandez*, 819 F.2d at 1217; *Graham*, 822 F.2d at 849.

[36] Under prior IRS interpretations of § 170, any excess of the amount paid over the value of a Passover meal would be deductible as a charitable contribution. Rev. Rul. 70-47, 1970-1 C.B. 49 and Rev. Rul. 67-246, 1967-2 C.B. 104. Under the interpretations of § 170 in the cases on review, if the IRS challenges participants' deductions, the taxpayers would have the burden of establishing whether, and to what extent, their payments exceeded the value both of the meal and of the religious sacrament of participating in the Passover service.

[37] In disallowing the individuals' deductions for payments to their Churches here, the Tax Court stressed what it labelled the "commercial" character of the churches' fund-raising methods, including such things as the churches' use of receipts for payments, their acceptance—indeed encouragement—of credit card payments, and the aggressive proselytization of the religion through such methods as free lectures, handouts and radio and newspaper advertisements. In sum, the Tax Court placed considerable emphasis on what it described as the goal of the church's financial offices of "making money." 83 T.C. at 578-79. In affirming the Tax Court's decision, these factors were also regarded as important by the Ninth Circuit, *Graham*, 822 F.2d at 847, but not

to select at will which of those payments it will allow to be deducted and which it will not.

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by the First, Second, Fourth, or Eighth circuits. (The Tenth Circuit's position on this issue is ambigious.)

Practices such as the use of bank credit cards are quite common among many religious and other charitable organizations. Commentators have observed that many churches encourage charge-account giving as well as automatic periodic withdrawals from bank accounts, and often suggest that such methods may increase donations. *See, e.g.*, R. Knudsen, *New Models for Financing the Local Church: Fresh Approaches for the Computer Age* (1985); H. de Mena, Jr., *How to Increase Parish Income* 55-57 (1982). The use of credit cards by charities has become so common that a decade ago the IRS ruled that deductible contributions may be made by bank credit card. Rev. Rul. 78-38, 1978-1 C.B. 67.

Modern business techniques have never been held to compromise deductibility of donations. The discussion of commercial techniques in *United States v. American Bar Endowment*, 477 U.S. 105 (1986), has no application to the cases on review. *American Bar Endowment* involved a "trade or business" of selling insurance held by this Court to be "unrelated" to the organization's tax-exempt purpose. Here payments to participate in the core religious practices of a tax-exempt church are at issue. There is no case, apart from the instant contest, where a court has relied on the "commercial" character of a tax-exempt organization's fund-raising efforts to disallow deductibility of a charitable contribution under § 170. Commercial-type fund-raising techniques are legally irrelevant to this case.

By stipulating that the recipients of the payments at issue here are tax-exempt churches under § 501(c)(3) of the Internal Revenue Code, the government has necessarily agreed that each Scientology church that received the donations at issue "engages primarily in activities which accomplish one or more of [the] exempt purposes specified in § 501(c)(3), [and that no] more than an insubstantial part of its activities is not in furtherance of an exempt purpose." Treas. Regs. § 1.501(a)(3)-1(c)(1). The Eighth Circuit recognized that the "commercial" character of the church's fund-raising efforts is immaterial in light of the government's stipulation that the payments were made to a religious organization exempt from tax under I.R.C. Section 501(c)(3) and remarked that if the payments by the taxpayers here "were not contributions then 'the passing of the collection plate in church would make the church service a commercial project,'" *Staples*, 821 F.2d at 1325-26 & 1327 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)).

As the foregoing summary of practices of various denominations demonstrates, Scientology, although a new and small denomination, has much in common with both traditional Western faiths and Buddhism. The practices singled out by the IRS for taxation here are comparable in many ways to practices in other faiths. For nearly seven decades the IRS consistently has allowed deductions for payments by individuals to participate in the religious sacraments of their faith regardless of the form of the payment or the nature or value of the religious service provided in return. Without any change in its administrative rulings or regulations, the IRS now urges this Court to endorse a dramatic reversal of its prior interpretations of § 170. In addition to the inevitable entanglement with religion that would result (see Section III, *infra*), the rule of law that the IRS now urges on this Court has potentially severe financial implications for all religious denominations.[38] The IRS may well be tempted on occasion selectively to disallow deductions for payments to religious organizations for political or philosophical reasons or even simply to increase federal revenues. This would be a poor substitute—indeed one that contravenes the First Amendment—for the guarantee of neutrality across religious denominations of prior IRS in-

[38] Because there is no direct government funding for religious activities, religious organizations depend more on contributions from members than other tax-exempt organizations. Like most churches and other religious organizations, donations from adherents provide the major source of funds to Scientology Churches. *Graham*, 83 T.C. at 578. Religious organizations routinely receive in excess of 90 percent of all revenues from contributions. C. Clotfelter, *Federal Tax Policy and Charitable Giving* 10-11 (1988).

In terms of sheer magnitude, religious organizations are by far the most important category of recipients of individual contributions. In 1982, for example, contributions to religious organizations amounted to $28 billion and accounted for 47 percent of total gifts to charities, with education and health organizations the next largest categories, each receiving 14 percent of the total. *Id.* at 10. This has long been a consistent pattern. *Id.* Moreover, econometric evidence suggests that religious giving is as tax sensitive as other charitable giving. *Id.* at 65-66.

terpretations of § 170 that allow without question deductions for payments by individuals to participate in the religious services of their faith.

II. THE DECISIONS BELOW IMPROPERLY REVERSE NEARLY SEVEN DECADES OF CONSISTENT IRS INTERPRETATIONS OF § 170 THAT ALLOW DEDUCTIONS FOR PAYMENTS MADE BY INDIVIDUALS TO PARTICIPATE IN THE RELIGIOUS SERVICES OF THEIR FAITHS.

The courts below that have denied deductions for the donations at issue here have grounded their decisions on the absence of explicit language in § 170 distinguishing payments to churches for religious services from payments to tax-exempt organizations for commercial or secular goods and services. Finding no explicit statutory guidance, these courts extended *United States v. American Bar Endowment*, 477 U.S. 105 (1986)—a case denying claimed charitable deductions for purchases of insurance—to disallow deductions here.[39] *Hernandez*, 819 F.2d at 1216-18; *Graham*, 822 F.2d at 849; *Christiansen*, 843 F.2d at 420; *Miller*, 829 F.2d at 503.[40]

Such an extension of *American Bar Endowment* overturns the fundamental distinction, established by seventy

[39] *American Bar Endowment* involved an organization (ABE) that conducted a "trade or business" unrelated to any charitable activity—the provision of insurance to its members. ABE gave charitable organizations the excess of the members' premium payments over the cost of providing the insurance. The only question in the case arising under § 170 was whether the excess payment was a deductible contribution by the members. This Court held the payments not deductible because the members had failed to demonstrate that they could have purchased comparable insurance policies elsewhere for less than the full amount that they paid. 477 U.S. at 118. ABE subsequently restructured its insurance program in a way that made the amounts deductible under § 170. Ltr. Ruling No. 8725028, March 20, 1987.

[40] The Tax Court's decision below preceded this Court's decision in *American Bar Endowment*. The *Hernandez* opinion notes that the Tax Court "anticipated and correctly applied the *American Bar Endowment* test." 819 F 2d at 1218 n.9.

years of consistent IRS practice never questioned by Congress, that always has allowed deductions for payments by individuals to tax-exempt churches to participate in the sacraments of their faith, while denying deductions for payments to tax-exempt organizations in return for secular goods or services. In so doing, the decisions on review disregard the support for this enduring administrative interpretation in the statute itself, as well as in the basic policies, legislative background and history of § 170.

The decisions below contravene the "well established canon of statutory construction" that "a court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute . . . and the objects and policy of the law.*" *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857)) (emphasis in original). Further, congressional refusal to alter or amend § 170 surely implies acquiescence in and "ratification by implication" of the IRS's well-known administrative position. *See Bob Jones Univ.*, 461 U.S. at 599. Even given the traditional reluctance to attribute significance to congressional inaction, the IRS's consistent administrative interpretations—announced virtually contemporaneously with the 1917 enactment of the charitable deduction, reaffirmed by that agency half a century later, and never questioned by Congress—are, at a minimum, "of considerable significance in determining the intended meaning of the statute." 461 U.S. at 619 (Rehnquist, J., dissenting).[41]

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[41] These administrative pronouncements have exceptional weight in the tax area, where the Internal Revenue Code is continually involved in a process of re-enactment and revision and where congressional oversight committees exercise constant supervision. This scrutiny assures that Congress is aware of such long-standing interpretations and has decided to leave them in place. *See, e.g., United States v. Correll*, 389 U.S. 299, 305-07 (1967); *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 283 (1966); *United States v. Leslie Salt Co.*, 350 U.S. 383, 395-96 (1956); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938); Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 Harv. L. Rev. 377, 379 (1941).

In addition, the decisions on review create serious constitutional problems. Those courts that ground their holdings in the structure of the transactions[42] not only contradict the fundamental principle of tax adjudication that requires the *substance*, not the form, of a transaction to govern,[43] but would introduce into the tax law distinctions among religions based upon fund-raising practices.[44] This violates the constitutional requirement of neutrality among religious denominations and excessively entangles the government in religious affairs. See Section III, *infra*.

The decisions on review disregarded the special constitutional status of religion, improperly treating payments to a church to participate in sacraments as identical to the purchase of commercial products and services. A court must not construe an act of Congress to violate the Constitution "if a construction of the statute is fairly possible by which the question may be avoided,"

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[42] Three of the affirming courts explicitly based disallowance of the deductions on the "structure," "external features," or "circumstances" of the "transaction." *Graham*, 822 F.2d at 848-49; *Christiansen*, 843 F.2d at 420; *Miller*, 829 F.2d at 505.

[43] *See, e.g., United States v. Phellis*, 257 U.S. 156, 168 (1921) (treating the superiority of substance over form as a well-settled principle of tax adjudication).

[44] Variations in church fund-raising practices make untenable these courts' departure from prior practice in relying on the "structure" or "external features" of the payments to disallow deductions. As Section I details, the church's practice here in substance is not materially different from more traditional religious organizations' use of—and the IRS's allowance of deductions for —fixed payments on a periodic or annual basis. As the Eighth Circuit recognized, a fixed payment schedule simply may be a more effective means of fundraising for a church that provides individualized, rather than congregational, services. *Staples*, 821 F.2d at 1327-28, Although the Tax Court acknowledged that the fixed payment schedule, like the tithe, has an historical linkage to the income levels of the church community and is based on church doctrine, it nevertheless found that the payments here were for a *quid pro quo* and thus nondeductible. This elevation of form over substance is an improper interpretation of § 170.

United States v. Clark, 445 U.S. 23, 27 (1980), or indeed "if any other possible construction remains available." *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979).[45] Not only is such a construction "available" and "fairly possible," it has been the IRS's interpretation for seven decades.

A. The IRS's Long-Standing Distinction Between Payments For Religious And Secular Benefits Is Sound.

The distinction between religious benefits, on the one hand, the receipt of which does not disqualify charitable deductions, and benefits sold in the secular marketplace, on the other hand, finds support in the legislative history of § 170 and its fundamental policies as well as in prior administrative pronouncements by the IRS.

In the legislative history of the 1954 Code, Congress indicated that the phrase "contribution or gift" as used in § 170 is limited to "those contributions which are made with no expectation of a *financial return commensurate with the amount of the gift.*" H.R. Rpt. No. 1337, 83rd Cong. 2d Sess. 44A (1954) (emphasis added). *Accord* S. Rep. No. 1622, 83rd Cong. 2d Sess. 196 (1954).

[45] The holdings of the courts below concededly raise "serious practical and constitutional difficulties," and "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Hernandez*, 819 F.2d at 1218; *Christiansen*, 843 F.2d at 420. They ignore the admonition of this Court that where a particular interpretation of a statute raises serious constitutional issues, a court should not attribute that interpretation to Congress unless "the affirmative intention of the Congress [to do so is] clearly expressed." *Catholic Bishop*, 440 U.S. at 500, 507. The dissenting Justices in *Catholic Bishop* rejected the majority's canon of statutory interpretation and instead would have required that a reading of a statute sensitive to religion be "fairly possible." 440 U.S. 508-11 (Brennan, J., dissenting). *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (federal statutes are to be construed to avoid serious doubts of their constitutionality); *Morrison v. Olson*, No. 87-1279 Slip Op. (U.S. June 29, 1988) (It is the duty of federal courts to construe a statute in order to save it from constitutional infirmities). The IRS's interpretation for seven decades obviously meets even the "fairly possible" standard.

The IRS summarized this rule in Rev. Rul. 76-185, 1976-1 C.B. 60 at 60-61 (emphasis added):

> For purposes of section 170 of the Code, a contribution or gift is a voluntary transfer of money or property made by the transferor without receipt or expectation of a *financial or economic benefit commensurate with the money* . . . transferred. See Section 1.170A-1(c)(5) of the Income Tax Regulations; *H.R. Rep. No. 1337*, 83rd Cong., 2d Sess. A44 (1954); *S. Rep. No 1622*, 83rd Cong, 2d Sess. 196 (1954) If the transferor receives, or can reasonably expect to receive, a *financial or economic* benefit that is commensurate with the money . . . transferred, no deduction under section 170 is allowable. . . . However, if the transferor receives, or can reasonably expect to receive, a *financial or economic benefit* that is substantial but less than the amount of the transfer, than [sic] the transaction may involve both a purchase and a gift, and a *deduction* under section 170 *would only be allowable*, assuming the requirements in that section are otherwise met, *for the excess of the amount transferred over the amount of the financial or economic benefit received* or reasonably expected to be received by the transferror.

Each of the prior cases denying charitable deductions to a qualified tax-exempt recipient involves a benefit that conforms to this definition of "financial" or "economic," *viz.*, goods or services provided in the secular marketplace.[46] This prevents tax-exempt organizations from gaining an unfair competitive advantage by providing taxpayers with secular goods or services, like insurance paid for through tax deductible contributions.[47] *See*

[46] The dictionary illustrates the linkage between secular services and the phrase "economic benefit," defining "economic" as "of or pertaining to the production, development, and management of material wealth, as of a country, household or business enterprise." *The American Heritage Dictionary of the English Language* 413 (1981).

[47] *See, e.g., United States v. American Bar Endowment*, 477 U.S. 105 (1986) (insurance); *Sedam v. United States*, 518 F.2d 242 (7th Cir. 1975) (admission to an old-age home); *Feistman v. Commis-*

Staples, 821 F.2d at 1327. In addition, this practice precludes deductions disguised as charitable contributions for payments for secular goods and services that otherwise would not be deductible.[48]

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sioner, 30 T.C.M. (CCH) 590 (1971) (party following a bas mitzvah); *Murphy v. Commissioner*, 54 T.C. 249 (1970) (adoption services) (explicitly distinguishing the personal expense of adoption from a payment to participate in religious services).

The Tax Court relied on only two cases, *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962) and *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1978), to support its conclusion that a payment for religious services was a *quid pro quo*. Both cases involved payments made to church schools providing accredited secular education to the taxpayers' children. *See also Winters v. Commissioner*, 467 F.2d 778 (2d Cir. 1972); *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972).

The IRS distinguished parochial education from religious services in a General Counsel Memorandum which explains that "essentially secular activities," including education, stand on a far different footing than "an inherently religious program." G.C.M. 35986 (Sept. 13, 1974):

> The state is not free to impose a tax on the conduct of an inherently religious program. It is nonetheless clear that the essentially secular activities with which we are here concerned fall in a distinctly different category.
>
> In view of the fact that the Free Exercise Clause of the First Amendment provides no special sanctuary for any conduct other than inherently religious activities, we think the Service should continue to hold that whenever an educational institution comparable to the petitioner in [*Bob Jones University v. Simon*, 416 U.S. 725 (1974)] restricts its enrollees on a racially restrictive basis, such action will bar it from recognition as a charity for Federal tax exemption and deduction purposes without regard to whether or not such restriction may be founded on a religious conviction.

The distinction between educational and religious activities was noted by this Court in its subsequent opinion in the Bob Jones University controversy: "We deal here only with religious *schools*—not with churches or other purely religious institutions. . . ." *Bob Jones Univ. v. United States*, 461 U.S. at 604 n.29 (emphasis in original).

[48] *See, e.g.*, § 262, which denies deduction generally for personal, living or family expenses. The Committee Report on the 1954 Code points to the provision of medical care as a specific example of an economic benefit that would result in the denial of a charitable contribution deduction under § 170. H.R. Rept. No. 1337, *supra*. This bars taxpayers from subverting limits on medical deductions under § 213 by disguised charitable contributions. Likewise, allowing deductions under § 170 for educational expenses would undermine the education expense tax regulations that allow deductions only for education that serves vocational or business purposes. *See* Treas. Regs. § 1.162-5.

In its traditional distinction between economic, financial or secular benefits and religious benefits, the IRS properly relied upon the law of charitable trusts, which recognizes that despite a limited number of direct beneficiaries, payments "for the advancement of religion" are charitable. *See, e.g.*, 4 A. Scott, Law of Trusts § 375.1 at 2940 (1967).[49] Specifically, the IRS has held that religious benefits to the individual are "incidental," even when private Masses or the collection of a particular family's genealogical information are undertaken for religious purposes. Revenue Ruling 71-580, 1971-2 C.B 235, 236, states the IRS's reasoning:

> The law of charity generally recognizes that the saying of mass or the conduct of similar religious observances under the tenets of a particular religion are a spiritual benefit to all the members of that faith and to the general public. Any private benefit to a given family or individual that may result is regarded as merely incidental to the general public benefit that is served.

The Tax Court also has recognized that individual religious benefits are by law treated as "incidental." *Murphy v. Commissioner*, 54 T.C. 249, 253 (1970) ("[T]he benefits [of contributions to churches] are merely incidental to making the organization function according to its charitable purposes.")

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[49] *See also, e.g.*, Scott, *supra*, § 371.5 at 2892, noting that the benefits of a Mass for an individual "are not confined to the particular soul but extend to the other members of the church and to all the world, according to the doctrines of the Roman Catholic Church." This Court has recognized the relevance of the law of charitable trusts to interpretations of § 170. *Bob Jones Univ. v. United States*, 461 U.S. at 589 n.13.

Both the Eighth and the Second Circuits applied this traditional analysis, holding that the individuals' benefit from religious services here is incidental to the general public benefit served by religious pluralism, stating:

> Religious observances of any faith are considered under the law of charity to be of spiritual benefit to the general public as well as to the members of the individual faith, with the *private benefit to individual participants being merely incidental* to the broader good that is served.... *The public benefit from religion remains and predominates regardless of whether church doctrines provide for traditional congregational worship or individual worship as in Scientology or whether donations are voluntary or fixed.*

Staples, 821 F.2d at 1326 (emphasis added). *See also Foley*, 844 F.2d at 96 (citing Rev. Rul. 71-580) ("Donations related to participation in religious observances ... have not been regarded as yielding specific private benefits to the donor, who is considered only an incidental beneficiary, the primary beneficiaries of the observances being the members of the faith and the general public.").[50]

Section 170 should be interpreted as it has been for the past 70 years—to distinguish religious services from

[50] Indeed, prior to this litigation, no tribunal had ever suggested that the benefits of payments made to receive or participate in an act of religious worship were not incidental and therefore deductible. *See, e.g., Estate of Carroll v. Commissioner*, 38 T.C. 868 (1962) (deduction allowed for cost of repairing Roman Catholic chapel on taxpayer's property, although value of property was clearly enhanced); *Sims v. Commissioner*, 10 T.C.M. (CCH) 608 (1951) (deduction allowed for contributions to church "which [taxpayers] attended"); *Lobsenz v. Commissioner*, 17 B.T.A. 81, 82 (1929) (deduction allowed for contribution "to a synagogue of which [taxpayer] was a member"); Rev. Rul. 78-366, 1978-2 C.B. 241 (estate tax deduction allowed for bequest to church to say regularly scheduled Masses for members of decedent's family).

secular or commercial services.[51] The Eighth Circuit in *Staples* recognized this distinction, finding that Congress intended under § 170 to treat religious services differently from secular, economic services. 821 F.2d at 1326-27. *Accord Foley*, 844 F.2d at 96-97.[52]

Nearly 70 years of tax administration, unquestioned by Congress, have confirmed the wisdom and practicality of this distinction. The IRS has always been able to distinguish a tithe for adoption services from a tithe for admission to a Mormon temple; a ticket for the theater from a ticket for Jewish High Holy Day services; dues for membership in an aerobics club from dues for membership in a church; and payment for seats in a football or basketball arena from seats in a church pew.

B. The Decisions Below Require IRS Valuation Of Religious Services—A Task That Is Both Impractical And Unconstitutional.

United States v. American Bar Endowment, 477 U.S. 105, involved claimed deductions for insurance premiums.

[51] This interpretation would allow deduction of the payments at issue here and is wholly consistent with prior case law denying charitable contribution deductions for: (1) payments to a church for use of facilities for a wedding, *Summers v. Commissioner*, 33 T.C.M. (CCH) 695 (1974); (2) payments to a religious home for the aged to care for the payor's father, Rev. Rul. 58-303, 1958-1 C.B. 61 (*Cf. Wardell v. Commissioner*, 301 F.2d 632 (8th Cir. 1962) (allowing such deductions)); (3) payments for raffle tickets, *Goldman v. Commissioner*, 388 F.2d 476 (6th Cir. 1967); and (4) payments to a synagogue for a party following a religious ritual, such as a bas mitzvah, *Feistman v. Commissioner*, 30 T.C.M. (CCH) 590 (1971).

Each of the foregoing services could have been provided by a secular commercial enterprise instead of the religious organization. In contrast, religious services are not provided by any secular organization.

[52] The fact that Congress has shown special sensitivity to churches throughout the Internal Revenue Code (to take but one example, in § 7611 imposing special restrictions on IRS audits of churches to minimize entanglement between government and religion) also supports the interpretation of § 170 urged by the taxpayers here.

In disallowing the deductions, this Court relied on the "two-part test" of Rev. Rul. 67-246, 1967-2 C.B. 104, stating:

> First the payment is deductible only if and to the extent it exceeds the market value of the benefit received. Second, the excess payment must be "made with the intention of making a gift." 1967-2 Cum. Bull. at 105.
>
> The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return.

477 U.S. at 117-18.

To qualify for charitable deductions, taxpayers have long been required to demonstrate the difference between the amount of the payment for a secular good or service and its fair market value.[53] Here, however, the petition-

[53] Even in the secular context, the lower courts disagree about the existence, propriety and meaning of any requirement under § 170 that taxpayers must show that deductible payments to charitable organizations were made "with the intention of making a gift." Some circuits have appropriated a test developed in connection with the exclusion of gifts from income under § 102 of the Code, *viz.*, that the payment must be the product of "detached and disinterested generosity." *Commissioner v. Duberstein*, 363 U.S. 278 (1960). The "detached and disinterested generosity" test was applied by the Ninth, Fourth, and Tenth Circuits to find that the payments at issue here are not deductible although each of those courts looked to the "structure" or "external features" of the transaction as a basis for inferring intention. *Graham*, 822 F.2d at 848-49; *Miller*, 829 F.2d at 502; *Christiansen*, 843 F.2d at 420. The First Circuit has generally rejected this test. *See Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972) and *Crosby Valve & Gauge Co. v. Commissioner*, 380 F.2d 146 (1st Cir. 1967) (expressing dissatisfaction with this test).

This test is not appropriate in the context of contributions to churches in exchange solely for religious services. The tax code cannot reasonably be interpreted to disallow charitable deductions for those who make payments to churches in the belief that what they receive in return—perhaps the hope of salvation or a purer soul—is more valuable than what they gave away, and, at the same time, to allow deductions for those parishioners who make payments to churches skeptical of the value of any religious benefits

ers received in "return" not a commercial economic product like life insurance, but instead participation in religious worship, which has no calculable financial or economic value.

Nevertheless, the courts below held that *American Bar Endowment* requires a determination of the monetary value of religious services received in return for a parishioner's payments. *Graham*, 822 F.2d at 849; *Miller*, 829 F.2d at 503; *Christiansen*, 843 F.2d at 420-21; *Hernandez*, 819 F.2d at 1216 ("The taxpayer . . . must at a minimum demonstrate that he purposely contributed money or property *in excess of the value of any benefit he received in return*") (quoting *American Bar Endowment*, 477 U.S. at 118 (emphasis added)). *Contra*, *Staples*, 821 F.2d at 1328; *Foley*, 844 F.2d at 97.

The Ninth Circuit concluded not only that the value of the religious benefit received by Scientologists is "measurable," but that its value could be determined "simply by looking at the amount of money that [petitioners] were willing to pay." 822 F.2d at 849-50. The court blithely characterized the payments as having occurred in a "market setting" and dismissed as "not significant" the fact that "the benefit may have had value only to religious adherents." *Id.* at 849. Such a conclusion was correctly rejected by the Eighth Circuit in *Staples*:

> [T]hese stipulations foreclose any reliance on the Church of Scientology's fixed donations as representing the value of its essential religious practices. Under the stipulations the fixed donations are not market prices set to reap the profits of a commercial moneymaking venture; rather, the Church of Scientology is a bona fide church which selected fixed

that flow in return. The reliance on this test by the Fourth, Ninth, and Tenth Circuits should be rejected by this Court, notwithstanding the *American Bar Endowment* suggestion that the intention of the taxpayers was important to that case. 477 U.S. at 117-18.

donations as its mechanism for raising funds from its members.

821 F.2d at 1327-28.[54]

When payments are made for religious services, important First Amendment problems arise that simply are not at stake when this legal standard is applied to secular services. Indeed, the First Circuit explicitly acknowledged that "constitutional difficulties," such as "the problem of excessive entanglement in the affairs of a religious institution," may arise where the valuation of religious practice is at issue. *Hernandez*, 819 F.2d at 1218.[55]

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[54] Furthermore, automatic valuation of services provided by a charitable organization as equivalent to the amount paid—as done by the court below—is contrary to IRS rulings and case law. *See, e.g.*, Rev. Rul. 67-246, 1967-2 C.B. 104; *American Bar Endowment*, 477 U.S. at 118; *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972) (disallowing $640 of $900 claimed as a deduction for educational benefits); *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962) (disallowing $400 of $1,075 claimed as a deduction for educational benefits).

[55] Notwithstanding the First Circuit's recognition of the significant constitutional problems created by its decision, that court nevertheless offered three methods for valuing religious services: (1) the price set by the service providers, (2) the prices set by providers of similar services, or (3) the costs of providing the service. *Hernandez*, 819 F.2d at 1217. Each of these methods faces "practical and constitutional obstacles." The first method has been discussed *supra*. The second suggestion—that religious services may be valued by reference to "the price set by providers of similar services"—is unworkable as well as unconstitutional. In the case of religious services, there are no "similar services" whose prices may be ascertained. Not only are there no prices to which comparison can be made, but the very notion of comparing relative values of religious services impermissibly entangles church and state both through the valuation of religious services and through the creation of denominational preferences. *See Walz v. Tax Commission*, 397 U.S. 664, 674 (1970); *Larson v. Valente*, 456 U.S. 228, 234 (1982); and Section III, *infra*.

Finally, valuing services based on the "costs of providing the services," *Hernandez*, 819 F.2d at 1217, also would create constitutional difficulties. Determining the cost of providing services would require deep intrusions into a church's finances and operations, creating excessive and unconstitutional church-state entanglement. *Aguilar v. Felton*, 473 U.S. 402 (1985).

The *Staples* court remarked upon the unprecedented nature of the proposals for valuation made by the First Circuit:

> No case to which we have been cited values in that manner the strictly religious practices presented by the stipulations in this case . . . . Spiritual gain to an individual church member cannot be valued by any measure known in the secular realm.

821 F.2d at 1327. *See also*, *Foley*, 844 F.2d at 97 ("[T]here is no way of measuring spiritual or religious benefits.")

III. DENIAL OF DEDUCTIONS UNDER § 170 VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

Both because of the historic futility of attempts to impose religious orthodoxy, *Wallace v. Jaffree*, 472 U.S. 38, 54 n.39 (1985), and because of the inherent right of all people to practice their beliefs, whether or not they appear unpersuasive, distasteful, or even ridiculous to the majority of the population, *see* J. Madison, Memorial and Remonstrance Against Religious Assessment (1785), the religion clauses of the First Amendment were enacted to protect the believer from "the powers that are." *See* J. Noonan, *The Believer and the Powers That Are* (1987). They stand for the propositions that religious pluralism is essential to the welfare of the nation and that all citizens are entitled to protection from the imposition of an orthodoxy formulated by the government.

The constitutional protection of religion ensures that religious choices are made freely, *Wallace v. Jaffree*, 472 U.S. at 53, and without regard to political consequences, *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring), including the denial of otherwise avail-

able government benefits, *Hobbie v. Unemployment Appeals Comm'n*, 107 S.Ct. 1046 (1987).

The economic relations between believers and their religious institutions are as much a part of the religious autonomy protected by the separation of church and state as any other aspect of religious life. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (protecting the right to solicit funds). Indeed, it was largely to extricate government from the business of fundraising for churches that the establishment clauses of the state and federal constitutions were enacted. M. Howe, *The Garden and the Wilderness* 1-32 (1965).[56]

In light of the goals of the religion clauses, the long-standing practice of the IRS—which allows deductions for both fixed payments and individually determined amounts donated to religious organizations—is a valid accommodation of the religious interests of individual believers. This policy also avoids the imposition of or incentives to governmentally preferred means of religious fundraising. *See Corporation of the Presiding Bishop v. Amos*, 107 S.Ct. 2862 (1987); *Walz v. Tax Commission*, 397 U.S. 664 (1970). The deviation proposed by the IRS here inevitably would entangle government impermissibly in the relationship between adherents and their churches. Further, applying § 170 either to allow deductions for payments for congregational worship, but not for individualized worship, or to allow deductions for donations the amounts of which are fixed by the individual, but not for amounts fixed by the church or synagogue, creates an unconstitutional denominational preference.

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[56] As Robert Cover put it: "The religion clauses of the Constitution seem to me unique in the clarity with which they presuppose a collective, norm-generating community whose status as a community and whose relationships with the individuals subject to its norms are entitled to constitutional recognition and protection." *The Supreme Court 1982 Term Forward*: Nomos and Narrative, 97 Harv. L. Rev. 4, 32 n.94 (1983).

A. The Taxation Of Payments Made For Exclusively Religious Services Entangles Government In The Relationship Between Believers And Religious Institutions.

The establishment clause encompasses three main requirements, summarized in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 674.

The third element of this test is plainly violated by the decisions on review.[57] Generally, an impermissible entanglement exists whenever administration of a law or government program requires ongoing or invasive supervision of religious activity. *Aguilar v. Felton*, 473 U.S. 402, 412-14 (1985); *Walz v. Tax Commission* 397 U.S. 664 (1970).

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[57] Although the interpretation of § 170 proposed by the IRS in these cases arguably has a secular purpose, the second prong of the *Lemon* test may also apply to this case. As Justice O'Connor explained in her concurrences in *Amos*, 107 S.Ct. at 2873-75, *Jaffee*, 472 U.S. at 67, and *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984), this test focuses on whether government action sends a message to adherents of a particular faith:

> The second ... infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch, 465 U.S. at 688. The decision to abandon seven decades of uniform practice, which has never been formally altered by the IRS or questioned by Congress, to tax fixed donations to this church, conveys the inescapable message that denominations that worship individually or that require payments for admission to religious services are disfavored religious groups.

The valuation of religious services creates just such a threat of IRS supervision of religious beliefs and practices. The Tax Court explicitly recognized the exclusively religious nature of "auditing" and the relationship of the Church's fund-raising practices to religious doctrine.[58] Thus, the IRS has trespassed in an area reserved for untrammeled religious activity. *Lemon v. Kurtzman*, 403 U.S. at 614 ("[T]he objective [is] to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other."). A church's conduct of its central form of worship lies at the heart of the precinct of faith.

In *Walz*, this Court upheld property tax exemptions for religious organizations, because taxation would result in "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." 397 U.S. at 674. The prospect of "tax valuation," the Court held, further justified the decision not to tax. *Id.* The traditional practice of the IRS—that pew rents, annual dues, and other fixed donations are deductible—avoids the entanglement envisioned in *Walz*.[59] The departure from that policy urged here demands the very

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[58] There is no question that the activities at issue here take place in the quintessentially sectarian environment. To the extent, therefore, that the entanglement prong of the *Lemon* analysis has been limited to "pervasively sectarian" contexts, *see Bowen v. Kendrick*, Nos. 87-253, 87-431, 87-462, 87-775, Slip op. (U.S. June 29, 1988), the valuation of religious benefits still presents a classic example of impermissible entanglement. As Justice Blackmun emphasized in his dissent in *Bowen v. Kendrick*, "the question whether a government program leads to an excessive government entanglment with religion, . . . is and remains a part of the applicable constitutional inquiry." *Id.* at — (citation omitted).

[59] The fact that the entanglement occurs first between the IRS and individual believers and secondarily with religious institutions does not lessen the pervasiveness, and the resulting unconstitutionality of the entanglement. *See Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) (invalidating government program because supervision of teachers would necessitate entanglement in religion).

kinds of evaluation of religious benefits that *Walz* warned against.

In addition to the unconstitutional valuation of religious services, further entanglement will result from IRS interpretations of religious doctrine necessary to administer the tax. In Scientology, the Doctrine of Exchange dictates that inflow and outflow be maintained in proper proportion; the Tax Court found that the Church applied that religious doctrine in the fund-raising practice at issue here. 83 T.C. at 577. In other faiths, the financial commitments of members may also be grounded in religious doctrine or tradition. *See* Section I, *supra*. Tax differences among religious adherents may not constitutionally depend on whether tithing is "mandatory" or whether a synagogue includes its High Holy Day tickets in its annual dues or sells them separately, or whether under canon law Mass stipends more closely approximate a bilateral contract or a voluntary offering.[60]

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[60] Mass stipends apparently were a *do ut facias* contract under the 1917 Canon Law but are not under the 1983 Canons. *See* J. Coriden, T. Green & D. Heintschel, *The Code of Canon Law: A Text and Commentary* 668 (1985). Notwithstanding recent changes, many aspects of the 1917 Code remain unchanged. *Id.* at 668-72. Punishment for priests who accept lower stipends than those set by the diocese is a complex matter of church law. *See* Keller, *supra*, at 97:

> What punishment can a Bishop licitly inflict upon those who solicit stipends at a lower rate than the diocesan statutes permit? Canon 2408 does not answer the question, because that canon refers to Canon 1507, but not to Canon 832. Nor does Canon 2324 apply; for it refers only to Canons 827, 828 and 840. The answer is found in the "blanket clause," which covers a multitude of crimes: Canon 832 is sanctioned by Canon 2222, which states that ecclesiastical Superiors can inflict a suitable punishment for any transgression against any canon in the Code.

To the extent that deductibility of fixed payments is made to turn on whether and how fixed payments are enforced by the church or synagogue, government involvement in tangled and often disputed areas of religious law becomes inevitable.

Such inquiries constitute a prohibited invasion of religious practices and doctrine by government. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). Exegetical battles would inevitably occur if deductibility under § 170 were to turn on the "structure" of the transaction, as held below. For example, suppose the government determines that a payment of funds, say a tithe, results in a spiritual *quid pro quo*, and therefore is not deductible. To encourage tithing while avoiding the loss of deductions for adherents, the religious group might declare erroneous the government's interpretation of its doctrines, or even alter its fund-raising practices. To avoid such controversies, the establishment clause prohibits government evaluation of sacred texts. *See, e.g., United States v. Ballard*, 322 U.S. 78 (1944).

B. Denial Of Deductions For Fixed Donations Creates An Unconstitutional Denomination Preference.

Even assuming *arguendo* that scrutiny of religious doctrine does not in itself unconstitutionally entangle government with religion, denial of a government benefit, such as a tax deduction, based on the content of religious doctrine or the mode of church worship, establishes a denominational preference among religions, contrary to the benevolent neutrality required by the religion clauses. *Larson v. Valente*, 456 U.S. 228 (1982).

The Ninth Circuit distinguished Scientologists from parishioners of other churches on the ground that individual Scientologists are the "direct and primary beneficiar[ies]" of religious sacraments, whereas the public is considered to be the "primary beneficiary" of the sacraments of other faiths. *Graham*, 822 F.2d at 850. The court relied on a Scientology publication that states: "The benefits obtainable from Church services . . . are personal and are experienced by the individual." *Id.* The court's holding therefore permits the IRS to disallow deductions based upon either the nature of the religious services or the content of representations made by the religious organization to its members. Disallowing deductions for payments for services that are provided, in accordance with church scripture, ¶¶ 14, 15, JA 31, in a "personal" rather than a congregational setting places a heavy burden on the central practice of Scientology.[61]

The Tax Court also found that the "fixed donation" system implements a sincere religious belief, the Doctrine of Exchange. 83 T.C. at 577. If petitioners and their Church abandoned scripturally mandated one-to-one religious services in favor of congregational services and their religiously based method of fundraising in favor of dues or tithes, they apparently would not be denied deductions.

The First Amendment, however, prohibits such government pressure to abandon religious tenets. Such distinctions among religions violate the non-discrimination principles of the establishment clause. By artificially elevating the form over the religious nature of such payments, the courts below establish a tax preference for religious groups that do not specify membership costs.

A similar denominational preference was held unconstitutional in *Larson v. Valente*, 456 U.S. 228 (1982) (invalidating state regulation of religious organizations that solicit more than 50% of funds from nonmembers).

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[61] There is no question that denial of a deduction imposes a burden on the individual taxpayer. As in *Hobbie v. Unemployment Appeals Comm'n*, 107 S.Ct. 1046 (1987), *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963), the IRS here has burdened these believers by denying them a government benefit that is otherwise generally available. As this Court stated in *Sherbert*, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." 374 U.S. at 404. *See also Bob Jones Univ.*, 461 U.S. at 603-04 (disallowance of deductions for charitable contributions imposes burden on taxpayers' religious practices). This case is therefore distinguishable from *Lyng v. Northwest Indian Cemetary Protection Ass'n*, 108 S.Ct. 1319 (1988), and *Bowen v. Roy*, 106 S.Ct. 2147 (1986), in which the conduct of internal government affairs was held not to burden the free exercise of Native Americans.

Finding that the law created a denominational preference by discriminating against "small, new or unpopular denominations," the Court held that the elevation of form over substance in the fifty percent rule infringed religious liberty, which requires that "'[t]he government must be neutral when it comes to competition between sects.'" *Id.* at 246 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). "Free exercise," the Court stressed, "can be guaranteed only when [officials are required] to accord to their own religions the very same treatment given to small, new or unpopular denominations." 456 U.S. at 245.

As in *Larson*, the rule advocated by the IRS here is not justified by a compelling interest, and further is not closely tailored to fit that interest. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (only interests "of the highest order" may justify infringing religious liberty; infringement must be narrowly tailored).

According to the IRS, taxation of fixed donations is required to protect against the deduction of payments that yield personal religious benefits to the donors. Yet fixed payments that yield such benefits to adherents of other faiths traditionally have been deductible and have not undermined the integrity of the tax code. Further, promises of personal benefits in return for commitments to the religion, including financial support, are common to virtually every religious denomination. The IRS here attempts to discriminate among religions without compelling justification.[62]

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[62] The petitioners do not question the government's interest in a sound tax system. *United States v. Lee*, 455 U.S. 252 (1982). But the government's action here achieves exactly the opposite: by denying these deductions, the IRS creates unsound, discretionary, and unequal tax administration. Acceptance by the courts below of the IRS's contention that its compelling interest in the need to maintain a sound and uniform tax system justifies both any free exercise burden and violations of the establishment prohibition turns a substantial constitutional requirement into a mere formality. *Hernandez*, 819 F.2d at 1225; *Graham*, 822 F.2d at 850-53. *See also Graham*, 83 T.C. at 583.

The long American tradition of religious vitality and pluralism rests on constitutional protection of new and innovative religious beliefs and methods of worship. As Judge Noonan commented:

> Amish, Baptists, Black Muslims, Catholics, Christian Scientists, Episcopalians, Evangelicals, Hopi, Jehovah's Witnesses, Jews, Lutherans, Mennonites, Methodists, Mormons, Native Americans, Navahos, Presbyterians, Rumanian Orthodox, Russian Orthodox, Scientologists, Serbian Orthodox, Unification Church members—to list only the principal religious litigants —have found in the framework afforded by the Constitution a way of living with governmental power . . . accommodating enough not to destroy them or even to choke their development.

J. Noonan, *The Believer and the Powers That Are* 477 (1987). Whether the doctrine of a particular faith dictates that it worship congregationally or individually or that it impose tithes on its members, collect dues, pass the collection plate, or charge a set fee for its worship services, is for the religious group itself to decide.

The long-standing distinction between secular and religious services is grounded in the language and historical policies of the tax code, has never been questioned by Congress, and has permissibly accommodated religious interests for nearly seven decades. *See Amos*, 107 S.Ct. 2862. By contrast, the denial of deductions would permit the IRS to tax as it wishes religious benefits, thereby secularizing the religious enterprise. The religion clauses prohibit such infringement of religious liberty.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Internal Revenue Code of 1954 (26 U.S.C.) § 170—Charitable, etc., Contributions and Gifts *

(a) Allowance of deduction.

(1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. * * *

(b) Percentage limitations.

(1) Individuals.—In the case of an individual, the deduction in subsection (a) shall be limited as provided in the succeeding subparagraphs.

(A) General rule. Any charitable contribution to—

(i) a church or a convention or association of churches.

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* Only those portions of 26 U.S.C. § 170 and 26 U.S.C. § 501 relevant to the discussion in this brief are set forth here. References to Title 26 United States Code are to the Internal Revenue Code of 1954, which was in effect when the tax returns at issue here were filed and when the Commissioner's notices of deficiency were issued. As part of the Tax Reform Act of 1986, the 1954 Code was redesignated the Internal Revenue Code of 1986. Pub. L. 99-514 § 2(a), 100 Stat. 2085, 2095. The portions of sections 170 and 501 of the 1954 Code pertinent to this case were not changed by the Tax Reform Act of 1986 and remain in force in identical form.

shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year.

(c) Charitable contribution defined. For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of:

* * * *

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * *